

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOHNSON & JOHNSON HEALTH CARE .
SYSTEMS INC., .
Plaintiff, . Case No. 22-cv-02632
vs. . Newark, New Jersey
SAVE ON SP, LLC, . October 18, 2022
Defendant. .

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE CATHY L. WALDOR
UNITED STATES MAGISTRATE JUDGE

APPEARANCES (the parties appeared via Zoom videoconference):

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24 Also present: Michael V. Caracappa
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25

1 (Commencement of proceedings)

2 THE COURT: All right. 22-2632. We're here today
3 at 12:04 for oral argument on a motion to stay. That's
4 Johnson & Johnson versus Save On SP LLC.

5 Let's have appearances, beginning with Johnson &
6 Johnson.

7 MR. GREENBAUM: Good afternoon, Your Honor.

8 Jeffrey J. Greenbaum and Katherine Lieb from Sills Cummis &
9 Gross. And with me from Patterson Belknap are Adeel Mangi
10 and Michael Sochynsky.

11 Mr. Mangi will be arguing on our behalf today.

12 MR. MANGI: Good morning, Your Honor.

13 THE COURT: Good morning.

14 Okay. I just want to memorize where your squares
15 are. Got it. Okay.

Now, let's have defense.

17 MR. WOHLFORTH: Good morning, Your Honor. This is
18 Evans Wohlforth from the Gibbons firm. With me from Gibbons
19 is my colleague Mike Caracappa.

20 Also joining from the Selendy Gay & Elsberg firm
21 are Andrew Dunlap, who will be presenting the case for
22 defendants today.

23 In addition, our colleagues Meredith Nelson and
24 David Elsberg are on the line, all admitted pro hac vice.

25 | THE COURT: Okay. Thank you, everybody.

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1 So, Mr. Dunlap, I'm going to put it on you.

2 Explain to me why you think that this is a clear case of
3 hardship or inequity in starting discovery.

4 MR. DUNLAP: Yes, Your Honor. And thank you.

5 Well, quite simply, we think we have a very strong
6 motion here for a couple of reasons. One is we have a very
7 well-founded and potentially dispositive motion to dismiss
8 that could dispense of with all of Johnson & Johnson's claims
9 or significantly scale them back. There would be a large
10 burden to us from going forward under the proposal that
11 Johnson & Johnson has made because of the scope of the
12 discovery they're seeking on their claims and may well go
13 away.

14 Johnson & Johnson has identified no real prejudice
15 if document discovery --

16 THE COURT: But what's the burden?

17 MR. DUNLAP: The burden is the scope of the
18 discovery they want.

19 And there's some late-breaking news, Your Honor,
20 that I think will put this into better context for you, if I
21 may.

22 THE COURT: Sure.

23 MR. DUNLAP: So we made a proposal -- you had said
24 last time we were here that you wanted the parties to try to
25 work on an interim solution. And we tried, and we made the

1 proposal that is in our motion papers, which you say you're
2 familiar with.

3 Johnson & Johnson, as you know, came back and said,
4 no. They agreed to put off depositions, but they want
5 document production now. And not just regular document
6 production. They want to accelerate document production.
7 They want us to go from zero to substantial completion in
8 this case in five months. That's what they said in their
9 motion papers, which is highly accelerated for a case of this
10 size.

11 So recently we went back to them, and we made
12 another proposal. And they only just responded to it
13 yesterday, which is why we didn't have a chance to put in
14 something before the argument.

15 We said, if they really want to do document
16 production in five months, we would do it, but we had two
17 conditions -- two conditions. The first was that they had to
18 put a reasonable limit on the number of documents that we
19 would have to review. And we proposed 160,000 as a high
20 limit. And we based that on what we thought we could get
21 through in five months if we assigned a team of 20 attorneys
22 to review documents -- because we would still need to do the
23 earlier work of exchanging requests and responses and
24 negotiating search terms and all this stuff that I'm sure
25 you're more familiar with than you would like to be. Get

1 | that done. Even if you do that fast, that's about two
2 | months.

3 | And if we put eight -- 20 reviewers reviewing at
4 | the high end of the standard range, they could do about 200
5 | documents a day for eight weeks; that's about 160,000
6 | documents. That would leave us three or four weeks to do
7 | second-level review and quality control and the logistics of
8 | the production.

9 | You know, in their papers, they said they wanted
10 | something that was reasonable and attainable. Well, that's
11 | what we think is -- we could reasonably do from standing
12 | stop -- standing start to finish and in five months.

13 | THE COURT: So let me just stop you for a minute.

14 | MR. DUNLAP: Yes.

15 | THE COURT: You say 160,000 documents. What do you
16 | think is the entire field or number of documents? That
17 | 160,000 would be just an initial five-month-period
18 | production?

19 | MR. DUNLAP: No, Your Honor. They're the ones who
20 | say they want to do this fast. So our proposal would be if
21 | you -- if they really think they have to do all this fast, we
22 | will do 160,000 documents in five months. But then that
23 | would be it, that they couldn't come back and ask for more
24 | time or more documents, because they're the ones who are
25 | saying --

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1 THE COURT: Well, how could you possibly --

2 (Simultaneous conversation)

3 MR. DUNLAP: -- the essence.

4 I'm sorry?

5 THE COURT: How could either side speculate on how
6 many documents may or may not -- maybe they only the want
7 140,000, or maybe they want 560,000, but how can you -- how
8 can you put a number on documents prior to interrogatories,
9 prior to document production? That's like throwing caution
10 to the wind. Isn't it?

11 MR. DUNLAP: Well, we --

12 (Simultaneous conversation)

13 THE COURT: -- take that bargain --

14 MR. DUNLAP: Well --

15 THE COURT: -- but it -- are there five million
16 documents in total?

17 MR. DUNLAP: Well, we think that really proves our
18 point, Your Honor, which is what they're asking for is
19 something -- what they want is five months to complete
20 production with absolutely no document limit.

21 THE COURT: Right.

22 MR. DUNLAP: And they rejected our proposal of a
23 limit, which means that at a minimum, they want us to look at
24 hundreds of thousands of documents, if not more. And I think
25 that underscores two points. One is that there is

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1 substantial prejudice to here. They are looking at -- or at
2 least want the ability to go after a huge volume of
3 documents. 160,000 is a lot of documents. And they want
4 more than that.

5 And so the prejudice we're facing is while our
6 motion to dismiss is pending, having to look at all of those.
7 And it also shows that what they've proposed to you, which,
8 by the way, they didn't put any specific dates in their
9 proposals, is completely unworkable. So they rejected that.

10 THE COURT: Well, if they --

11 (Simultaneous conversation)

12 THE COURT: -- did a limit of documents, they'd be
13 subject to malpractice.

14 MR. DUNLAP: No -- well, Your Honor, I think -- I
15 don't think that's true if they mean what they say. There's
16 no way that you could do more than that, we think, reasonably
17 in five months. So if they don't want to agree to a --

18 (Simultaneous conversation)

19 THE COURT: I agree -- five months, if you have 20
20 reviewers at 200 a day, as you say, okay, that's fine.
21 That's an initial production, though.

22 MR. DUNLAP: Well, but if, in fact, they don't need
23 it done in five months, if they want more time, I think that
24 also speaks to the fact that there's no need to get this
25 done -- to start document production urgently.

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1 What we have proposed in our -- the one we put in
2 to the Court was that we would do a lot of the preliminary
3 work necessary to be ready to produce documents, exchanging
4 requests, doing responses and objections, litigating all of
5 that, search terms, custodians, time periods, litigating all
6 that, being ready to produce once the motion to dismiss comes
7 down, plus committing to do document production on an
8 accelerated time frame at that point.

9 And --

10 (Simultaneous conversation)

11 THE COURT: -- number of documents. That's what my
12 problem is.

13 MR. DUNLAP: Your Honor, in our first proposal, the
14 one we made to you, there's no document limit.

15 THE COURT: Right.

16 MR. DUNLAP: The only -- only limit we're proposing
17 is the one we proposed to them. If they really want to do
18 this fast in five months, we need a document limit because we
19 can't -- we can't -- unless we have some huge, like, floors
20 and floors of people reviewing documents, do more than that.

21 So if they want speed, they can't have size. If
22 they want size, then there's no reason to start things now.

23 But I'd like to pivot, if I could, to the second
24 point of the proposal we made to them, which is we said that
25 if they want us to start producing documents before the

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1 motion to dismiss is decided, we would do that. If their
2 claims are dismissed, they would bear the cost of the
3 document production.

4 So to be clear, if -- if we lose, they win, all
5 their claims go forward, we would pay for the whole thing.
6 But if they lose and their claims go away, they would pay for
7 it.

8 Now, we think we have a very good motion to dismiss
9 here.

10 THE COURT: It's very --

11 (Simultaneous conversation)

12 MR. DUNLAP: I'm sorry?

13 THE COURT: It's very casino-like.

14 MR. DUNLAP: Well, they have said some very unkind
15 things about our motions to dismiss. They hold one of our
16 arguments spurious. They said our arguments don't get out of
17 the starting gate --

18 (Simultaneous conversation)

19 THE COURT: Well, you're better than that.

20 Don't -- you can't take that stuff personally.

21 And we don't know.

22 MR. DUNLAP: Oh, Your Honor --

23 (Simultaneous conversation)

24 THE COURT: So let me just --

25 MR. DUNLAP: Your Honor, I'm not taking it

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1 personally.

2 What I'm saying is if they really believe, as they
3 have told you, that our motion to dismiss is not a basis to
4 stay because it is so weak, then they should be jumping at
5 this deal because it poses no risk to them, and the fact that
6 they're turning it down, we think, says a lot about what they
7 think of the merits of our motion to dismiss.

8 THE COURT: Okay. I am not -- I am not --

9 (Simultaneous conversation)

10 MR. DUNLAP: It is very well-founded --

11 (Simultaneous conversation)

12 THE COURT: -- I am not going to read the tea
13 leaves. That's not my job.

14 My job is to move cases. That's my job. I'm a
15 magistrate. The district judge can make any determination on
16 the motion to dismiss that he wants.

17 And I anticipate the motion to dismiss will be
18 sooner than we thought. I -- that's my anticipation, based
19 upon his moving his motions of recent.

20 So that -- I put that on the table for your
21 consideration.

22 I'm going to tell you -- I don't want to cut you
23 off, but, obviously, I am not staying discovery. But I do
24 think that there's some kind of schedule that you might agree
25 on that might be 160,000 documents in five months but not

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1 foreclosing -- because there's no way you can foreclose for
2 the production or for the request. That's an impossibility.

3 But if you -- we were to stage discovery such that
4 you'd meet and confer on need discovery plan, you've got to
5 do search terms, you've got to do custodians, you have to do
6 a confidentiality -- I'm sure there's going to be some
7 fighting over that. But I am telling you do not come to me
8 to decide your search terms because I will random strike the
9 bottom hundred.

10 So just -- you have to -- the fact that you haven't
11 even met and conferred on that is a little troubling.

12 And then we can go into production. But I
13 anticipate that the motion to dismiss will be decided well
14 before that five-month period.

15 MR. DUNLAP: Your Honor, well, I think that speaks
16 to what we put forward to you. We proposed doing
17 negotiate -- exchanging requests.

18 THE COURT: Right.

19 MR. DUNLAP: Exchanging limited interrogatories,
20 negotiating and litigating, if necessary, the scope of those
21 requests; negotiating search terms and custodians and doing
22 all of that work. So we are completely fine on that, and I
23 think the parties agree on that.

24 If, in fact, you believe that the judge is likely
25 to decide the motion to dismiss sooner rather than later, we

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1 think, then, that cuts toward entering our proposal, which
2 says let's do all that preliminary work, which is important
3 and often where rubber meets the road in terms of these
4 discovery fights. Have that done. And then once the motion
5 to dismiss decision comes down, if their claims survive,
6 we'll start producing at that point.

7 But the offer we made about doing document
8 production earlier was contingent on them accepting some of
9 these other terms, which they've said they'd not. If they
10 won't --

11 (Simultaneous conversation)

12 THE COURT: --

13 (Simultaneous conversation)

14 MR. DUNLAP: -- we're facing a huge burden -- I'm
15 sorry?

16 THE COURT: I don't care about your deals. They
17 have nothing to do with me. You rejected each other's deals.
18 That's fine.

19 What I'm saying is you're going to meet and confer.
20 You're going to start discussing e-discovery protocols,
21 custodians, search terms. You're going to start production,
22 rolling production. You're going to exchange document
23 requests and interrogatories. You're going to begin
24 discovery on -- as regular a schedule as possible.

25 I will agree to that backstop of five months for

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1 160,000 documents because I think that's reasonable in your
2 stated terms of what would be overly burdensome, although I
3 don't have a lot of specifics on that because I don't really
4 know what the requests are going to be.

5 That being said, start discovery. If you produce
6 160,000 documents in five months, I think that's fine. But
7 that's not to foreclose the production at 160,000 documents.

8 MR. DUNLAP: Well, Your Honor, we're glad to --
9 we've already sent them a proposed protective order and a
10 proposed ESI protocol. And they've sent us some comments
11 back. And so the parties are negotiating that.

12 And as we put in our order, we're glad to do
13 everything that you said in terms of starting to negotiate
14 everything.

15 And if you would like us to start rolling
16 production, we will.

17 THE COURT: Yes.

18 MR. DUNLAP: I will say, though, that the schedule
19 that we put in our second offer to them was a highly
20 accelerated one. We'll negotiate the terms with them, but I
21 think we are going to ask to proceed on a more regular
22 schedule -- I think that was the word you used -- a normal
23 discovery schedule for a case of this sort, and we can try to
24 negotiate exactly what that looks like with that.

25 THE COURT: Well, let me -- Mr. Mangi that I didn't

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1 mean to shut you down, but do you think under the suggestions
2 or the orders that I'm going to post -- which is going to be
3 a text order that discovery shall proceed -- you'll meet and
4 confer, submit a reasonable discovery schedule.

5 Do you think that that's possible to do?

6 MR. MANGI: Certainly, Your Honor. We have been
7 trying to have a conferral since the case first started. And
8 I have no reason to think, once we have that conferral,
9 anyone's going to be unreasonable.

10 So if order -- there is a couple of supplements I
11 would suggest, Your Honor, to ensure that goes smoothly.

12 THE COURT: Okay.

13 MR. MANGI: So the first is, Your Honor, I think it
14 would be very useful if the Court were to also set a date for
15 a Rule 16 conference so that we can promptly meet and confer.
16 And if we're able to agree on a schedule, great. If not,
17 we'll come back in front of you. Right?

18 THE COURT: Okay.

19 MR. MANGI: Say, here's a problem.

20 THE COURT: Good.

21 MR. MANGI: Second issue just for clarification, I
22 am not going to argue the under -- the motion to stay because
23 I think we're past that now. So I'll just focus on some of
24 these practical issues that have been raised. And I'm also
25 not going to address the proposal that Save On made because I

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1 think Your Honor has -- set that aside.

2 I just want to talk about this 160,000 limitation
3 that Mr. Dunlap spoke about, because I think there's a bit of
4 a disconnect, Your Honor.

5 Your Honor has been talking about a production of
6 160,000 documents as, you know, perhaps an initial
7 production, something that might be reasonable.

8 What Save On's proposal to us, setting aside the
9 conditions, was that they would not review more than 160,000
10 documents. And, you know, that creates a different host of
11 issues, and we don't think that's a reasonable limitation,
12 even out of the box.

13 You know, we're not -- we're not suggesting there
14 should be some crazy expedited schedule here. But I think
15 the starting premise should be, as Your Honor is indicating,
16 get started with discovery. No artificial limitations. Try
17 and agree on a schedule. And if you can't, you know, there's
18 a date set for a Rule 16 conference whether it's, you know,
19 two or three weeks from now, whenever Your Honor deems
20 appropriate. And then, you know, we'll try to come to
21 agreement whether the document production period ends up
22 being five months -- what we've proposed -- or whether it
23 ends up being, you know, something different from that.
24 We'll try and work that out so we don't bother you with that.
25 I hate to bother judges with time periods, let alone search

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1 terms. So I hope we can work that out. But --

2 THE COURT: I think -- let me say this. So I'm
3 clear, I don't think reviewing 160,000 documents is a
4 limitation. I think -- to me, it's a guideline, and it's
5 where to start.

6 I would never foreclose -- because I don't know the
7 body of documents. That's why I need you all to start,
8 initiate discovery so we can find out what the body is. Then
9 if it's burdensome, you can be specific, Mr. Dunlap. You can
10 say there's 14 million documents, and I can't have more than
11 20 people working on them for, you know, two documents a day.

12 I don't have enough specifics to even get near
13 granting a stay.

14 So what I'm suggesting is -- I'll -- Mr. Mangi,
15 you're right. I'll put a Rule 16 on, and I'm going to order
16 you to meet and confer, come up with a scheduling order
17 that's reasonable. If you disagree on specific items, give
18 me a side -by-side. Just to let you -- you know where that's
19 going. I'll go right down the middle. So you can anticipate
20 what's going to happen with that unless there's something
21 specifically burdensome, Mr. Dunlap or Mr. Mangi, that you
22 can say to me, "Judge, it can't be done."

23 So you'll do that. And that will be that.

24 And I will tell you this -- because I am not going
25 for this. The text order will be posted. If you appeal to

1 Judge Vazquez, that will not stay discovery.

2 MR. MANGI: Your Honor, may I just seek
3 clarification on a couple of quick points to smooth the way
4 for our conferral?

5 THE COURT: Okay.

6 MR. MANGI: Your Honor, first with regard to
7 interrogatories and aspects of discovery that go beyond the
8 document production, again, our view is we should start. If
9 there's a disagreement, you know, someone did seek a
10 protective order, but there should not be any artificial
11 preconditions of the scope of interrogatories.

12 THE COURT: Yes.

13 MR. MANGI: Great.

14 THE COURT: That's correct.

15 MR. MANGI: And then -- thank Your Honor.

16 And then the second and final point is with regards
17 to numbers of documents and search terms and how much should
18 have to be reviewed, our view, Your Honor, is that there's no
19 way to even get into that discussion until the parties have
20 collected documents from custodians, have run some search
21 terms so we know what the universe is.

22 So my suggestion is that there should be no
23 preconditions or limitations as part of this initial
24 discussion. Later on, when we get to collections and we have
25 the universe, if there's an issue in volume, parties can

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1 raise --

2 THE COURT: Yes. I agree with you one hundred
3 percent. We're not going to put any preconditions. I'm not
4 adopting either party's suggested orders.

5 I'm saying proceed with discovery in -- and I'll
6 use the word again -- "normal," the way any other case would
7 proceed with discovery at this point. I think we're going to
8 be surprised at how quickly that motion gets decided and we
9 won't be behind the eight ball.

10 I will take each deficiency or each complaint or
11 each grievance or each motion for a protective order on a
12 case-by-case basis or a motion-by-motion basis, and we're
13 just going to start the case.

14 So right now, both of you agree that you're to meet
15 and confer on your protocols, search terms, custodians, start
16 making document requests, interrogatories. And I do believe
17 before -- maybe even before, Mr. Dunlap, production proceeds,
18 that motion will be decided. So -- and that's -- believe me
19 when I tell you, I haven't spoken to Judge Vazquez, but I
20 have been following his motion list, and I'm seeing that his
21 turnover is pretty good.

22 So --

23 MR. GREENBAUM: Judge, would you like to set the
24 dates of the Rule 16 now to make sure that counsel are
25 available?

1 THE COURT: No because -- where's Tim? My deputy
2 has to do that, Jeff.

3 MR. GREENBAUM: Okay. Thank you.

4 THE COURT: And if you like the date, you'll let me
5 know. We'll do it by Zoom. If you don't like the date, you
6 let me know, and we'll arrange for some new dates. Or if you
7 hate the date, meet and confer and submit three or four
8 dates.

9 MR. GREENBAUM: Okay.

10 MALE SPEAKER: -- do that, Judge. Thank you.

11 | THE COURT: All right?

12 | MR. MANGI: Thank you, Judge.

13 MALE SPEAKER: Thank Your Honor.

14 THE COURT: Hmm?

15 MR. GREENBAUM: You need an order submitted on
16 denying the motion to stay or?

17 THE COURT: No. I'm going to do it in a text
18 order.

19 MR. GREENBAUM: Okay. Thank you, Your Honor.

THE COURT: You know, with very loose outline.

21 So -- okay. Thank you very much.

UNIDENTIFIED SPEAKERS: Thank you, Your Honor.

THE COURT: Bye-bye.

24 | (Conclusion of proceedings)

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|Certification

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11 I further certify that I am in no way related to any of
12 the parties hereto nor am I in any way interested in the
13 outcome hereof.

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S/ *Sara L. Kern*

20th of October, 2022

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